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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 947

W. WILLARD WIRTZ,
SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,
Petitioner,

v.

MODERN TRASHMOVAL, INC.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (J.S. App. 16-37) is reported at 207 F. Supp. 596. The opinion of the Court of Appeals (App. 1a-36a) is reported at 323 F. 2d 451.

JURISDICTION

In his jurisdictional statement, the petitioner fails to consider the following: The Secretary of Labor brought three actions. The first (CA No. 8828, Dist. Ct. No. 13316) was an action for an injunction to restrain alleged violations of the Wage and Hour requirements (J.A. App. 1).

The prayers for relief did not include a petition for declaratory decree (J.A. App. 4). The other two actions (CA Nos. 8829 and 8830; Dist. Ct. Nos. 13420 and 13529), were wage suits brought by the Secretary of Labor under the alleged authority of Section 16(c) to recover alleged unpaid compensation claimed to be due to nineteen employees. The cases were consolidated for purposes of trial only. The District Court *dismissed* the injunction action for want of equity (J.A. App. 37). Although Modern Trashmoval, Inc. entered a notice of a limited appeal (J.A. App. 38); the Secretary of Labor did not enter any appeal from this decree. The Court of Appeals, of course, affirmed the decree of the District Court in this case (CA No. 8828; App. 37a). Respondent denies the right of the Secretary to bring the injunction action before this Court.

The two wage actions (CA Nos. 8829 and 8830) were brought under the authority of 29 U.S.C. Section 216(c) of the Act, which reads in part:

> "When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under Section 6 or Section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: PROVIDED, that this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding introduced or brought by the Secretary if it does involve any issue of law not so finally settled."

One of the pleas filed by the respondent in each of the wage cases reads as follows:

> "There are one or more issues of law involved in this case which have not been finally settled by the courts and the Secretary of Labor therefore has no authority to bring this suit." (J.A. App. 44, 72).

If, as the petitioner insists, the Court of Appeals in the present case is in error, then the petitioner, by virtue of his own strength, will have established that the issues of law involved in the case are not finally settled; and they will not have been finally settled until the Supreme Court has decided them. In such a case, the Secretary is without authority to bring a wage suit. The writ of certiorari should not be granted when the only possible effect of a favorable decision will be to establish the Secretary's lack of authority to bring the suits in the first place.

QUESTIONS PRESENTED

In addition to the two jurisdictional questions raised above, the respondent submits that the petitioner has erroneously assumed facts which are in direct conflict with the findings of fact of the Court of Appeals. In particular, the respondent denies the petitioner's assumptions of fact in question "1" tendered by him (Pet. 2) in which petitioner assumes that it has been proved that the nineteen employees for whom wage suits were brought were "engaged regularly and recurrently in the collection and removal of industrial waste, rubbish and debris from establishments engaged in interstate commerce or in the production of goods for interstate commerce . . ." The actual state of the proof will be discussed below.

The respondent therefore states that the questions presented are:

1. May the petitioner bring up for consideration by this Court the action of the District Court in the injunction suit (CA No. 8828)?
2. Did the Secretary of Labor have the authority to bring the two wage suits (CA Nos. 8829 and 8830)?

3. Did the petitioner prove that the nineteen employees who were use-plaintiffs in the wage suits were engaged "regularly and recurrently" in the collection of rubbish "from establishments engaged in interstate commerce or in the production of goods for commerce"?

4. Where the proof regarding the nineteen employees is limited to a stipulation that each of them worked a minimum of two or three minutes per week in collecting trash from an unidentified customer of Modern who was engaged in the production of goods for commerce, are such employees covered by the Act?

5. Is the business of removing waste, rubbish and debris from industrial or commercial establishments a "retail or service establishment" eligible to claim exemption under Section 13(a)(2) of the Act?

THE STATUTE INVOLVED

The pertinent provisions of the Fair Labor Standards Act are correctly set forth in the petition, except that the petition omits the quotation of the statute authorizing the Secretary to bring wage suits, the relevant portion of which reads as follows:

> "... When a written request is filed by any employee with the Secretary claiming unpaid minimum wages or unpaid overtime compensation under Section 6 or Section 7 of this Act, the Secretary may bring an action in any court of competent jurisdiction to recover the amount of such claim: PROVIDED, that this authority to sue shall not be used by the Secretary in any case involving an issue of law which has not been settled finally by the courts, and in any such case no court shall have jurisdiction over such action or proceeding

introduced or brought by the Secretary if it does involve any issue of law not so finally settled. . . ." (29 U.S.C. Section 216(c)).

STATEMENT

The petitioner's statement suggests that the Government has proved that the nineteen truck drivers and helpers for whom the Secretary brought wage suits were "regularly and recurrently" engaged in removing rubbish from establishments engaged in interstate commerce. This is very far indeed from the facts as found by the Court of Appeals (see opinion, App. 7a-8a). In substance, the Court of Appeals found that the Government's proof was limited to the following:

(1) That Modern had 800 to 1,000 customers, of whom four were engaged in interstate commerce.

(2) That no identification was made of particular use-plaintiffs as the employees serving these customers and no proof was presented that these customers or their shipments in interstate commerce were representative of Modern's customers as a whole.

(3) That the only other proof was a stipulation to the effect "that during the period in suit and his employment, each use-plaintiff worked a minimum of two or three minutes per week in collecting trash from an unidentified customer who was engaged in the production of goods for commerce" (CA Opinion, App. 8a).

Apparently recognizing this deficiency in proof, the petitioner attempts to rely upon a list of thirty-one customers which the Secretary furnished in advance of trial in response to an interrogatory (see Pet. 6). Petitioner offered proof regarding the production of goods for commerce with regard to only four customers as above stated.

Petitioner offered no proof whatsoever regarding twenty-five of these concerns. We are unable to understand the basis for the petitioner's reference to these unproved allegations of the Secretary; and we deny the petitioner's right to assume that these customers were producing goods for commerce at the locations served by Modern.*

In view of the Court's express findings which are inconsistent with the petitioner's assumptions, the respondent has included its question "3" which will require the petitioner to demonstrate how the Court of Appeals erred in its findings of fact as stated in its opinion (App. 7a-8a).

Contending as we do that the Court of Appeals did not err, question "4" tendered by respondent presents the issue on this subject upon the facts as the Court found them.

ARGUMENT

The Court Does Not Have Jurisdiction

The injunction action (CA No. 8828) was dismissed for want of equity by the District Court. The Secretary did not appeal. The Court of Appeals affirmed. Therefore, this case is not before the Court and the Secretary must base his right to a request for a writ upon the other two suits, which are wage suits. This is, in any event, proper because the Secretary only offered proof with regard to the wage suits and abandoned any attempt to go beyond the allegations of those suits.

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* We should add that the Secretary's answers to interrogatories as to what he would prove were in no sense an indication that the proof existed. He listed fifty employees whom he asserted were covered by the Act (J.A. App. 12-15). He offered no evidence whatsoever to support his allegations with regard to thirty-one of those listed; and abandoned his contentions regarding them in presenting his own case.

The Secretary's right to bring a wage suit is expressly limited to cases which do not involve unsettled issues of law. It was expressly the Congressional intent that the Secretary should not bring wage suits as test suits. Yet, if petitioner's allegations are to be accepted as true (particularly the allegations on page 19, part of which are quoted below), the purpose of the application for certiorari is to settle questions of law important to the entire industry which are at present undetermined. It is hard to understand how the petitioner, in the face of the adverse decision of the Court of Appeals, can attempt to overthrow that decision and at the same time allege that the law is settled. If it is settled, it is settled as the Court of Appeals decided. If that court were to be reversed, then until the reversal, the law will have been unsettled. If the law on any issue involved was unsettled, the Secretary had no right to sue. It would appear that the harder Mr. Solicitor struggles to avoid Charybdis the more firmly does he fall into the embrace of Scylla. It is submitted that this Court should not be interested in undertaking to pilot him out of his predicament.

Petitioner's Question No. 1

At the close of his petition, petitioner attempts to impress upon the Court the importance of the questions which he wishes to present. He says:

> "Directly and immediately the issues [in this case] will determine the applicability of the Act to some 34,500 workers employed as operators and laborers for refuse removal and sanitation companies throughout the nation. . . ." (Pet. 19).

The implication is that if the Court decides in petitioner's favor in the present case, all of these employees will be brought within the coverage of the Act.

Such an argument appears to disregard the fundamental requirements of the Act. The Court is without any doubt interested in determining whether an employer is engaged in commerce or the production of goods for commerce. But its decision in this regard is merely as an adjunct to a determination of whether *the employee* is engaged in commerce or in the production of goods for commerce. The authorities seem to be unanimous that it is ultimately the activities of each employee, and his relationship to commerce or the production of goods for commerce, which will determine whether or not the Act is to apply (see CA Op. App. 11a).* In the present case, the test of coverage is whether the employees of Modern were engaged in the production of goods for commerce—

> "or in any closely related process or occupation directly essential to the production thereof . . ." (29 U.S.C. Sec. 203).

It is, of course, clear that the employees of Modern were not directly engaged in the production of goods for commerce (CA Op. App. 13a). It would appear, therefore, that in any action brought by the Secretary the primary proof would be to show that Modern was dedicated to the removal of trash for persons engaged in the production of goods for commerce; and that the activities of each employee alleged to be covered were closely related and directly essential to the production of such goods. Question

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* In this connection it is notable that as late as 1961 Congress did see fit to enact legislation (effective September 3, 1961) which extends coverage to *all employees* of certain employers, whether or not the individual employees are themselves engaged in commerce or the production of goods for commerce (P.L. 87-30, 75 Stat. 65). But this legislation was confined to the larger employers, with (among other requirements) gross sales of over $1,000,000.00 (29 U.S.C. Sec. 203(r)). The legislation is not applicable here, and is merely mentioned because it indicates that in so far as the smaller employers are concerned, the older test is still in force.

"1" tendered by the petitioner indicates that the petitioner has submitted serious proof along these lines.

As the Court of Appeals points out, he did not (CA Op. App. 7a-8a). The proof in the present case fails to establish any particular interest, or dedication of Modern to removal of trash for persons engaged in commerce; and fails to prove anything beyond a very minimum connection between the employees of Modern and customers engaged in the production of goods for commerce. The Government's real objective, as stated in the last page of its petition, is apparently not to demonstrate that the employees in the present suit were covered; but that the whole industry is covered. And, indeed, if it were to be successful in the present case, the effect would in substance be to relieve th Government of all proof of any real relationship between Modern or its employees, and the production of goods for commerce. If, indeed, the Secretary is seeking to extend the Act to this extent, he would have been more frank by tendering his question "1" in the form in which the respondent has stated its question "4".

Furthermore, if the Court of Appeals is right in its summarization of the proof in the case, there is at present no conflict between the Circuits. The petitioner points to the decision of *Mitchell v. Dooley Brothers, Inc.*, 286 F. 2d 40*, as a decision which conflicts with the decision of the Court of Appeals in the present case. It is true that the reasoning of the Court of Appeals in the present opinion appears skeptical of the Dooley decision, but the facts of the two cases are so readily distinguishable that it is quickly apparent that the two cases do not conflict in the results reached. There it was conceded by the employer that the employees involved spent one-fourth to one-third of their time in making collections from customers engaged in the production of goods for commerce. Here the

*Cert. denied 366 U.S. 911.

proof is confined to a stipulation that a scintilla of time was used by each of the nineteen employees on such customers. The Court of Appeals points this out in its opinion (App. 23a).

While respondent, of course, relies upon *10 East 40th Street Co. v. Callus*, 325 U.S. 578, as a direct authority for its position, it is unnecessary to discuss that case at this time. The Dooley opinion may be in conflict with Callus, though the case was not mentioned in the opinion (CA Op. App. 24a). But the decision of the Court of Appeals in the present case is in conformity with *Callus*.

It may be that it is of great public importance, as the petitioner contends, that the industry receive an answer to question "1", as presented by him. But the answer of the Court in the present case, if in the Secretary's favor, would bring under the coverage of the Act far more than the question indicates because of the limited proof; and, if in the respondent's favor, would be of no use whatsoever in determining the law in cases where a substantial relationship between the employees of the trash removal company and customers engaged in the production of goods, can be proved.

For this reason, it would appear that, if the answer to question "1" posed by the petitioner is important, the Court should wait until that question is brought up in a record which truly reflects the assumptions of fact in the question.

The Exemption Issue

Petitioner's question "2" (restated as respondent's question "5"), relates to the holding that the respondent is an exemption establishment under the provisions of 29 U.S.C. Section 213(a)(2). Petitioner states that a decision on this point is of public importance. But in order to reach this question, the Court must decide all of the preceding

questions tendered by respondent (questions "1" through "4") in petitioner's favor. If the record does not properly present a true test case for petitioner's question "1" (as we contend), then more harm than good can be done if the Court attempts to decide the question merely in order to reach petitioner's question "2".

This is particularly true because of the fact that there is no conflict at all between the Circuits with regard to the right of a trash removal company to an exemption. As pointed out by the Court of Appeals, the Court in the Dooley case apparently did not even consider the matter (CA Op. 29a-30a). Therefore, the only Circuit which has given any direct consideration to this problem in so far as it applies to a trash removal company is the Court of Appeals below, and no conflict has yet been demonstrated. To the contrary, that Court has found that its decision conforms to the standards prescribed by the regulations of the Secretary himself, as of the January 1963 revision (CA Op. App. 31a).

CONCLUSION

If, indeed, the Government believes that the questions stated by it are of national importance, it does not presently have a record which will clearly present those questions.

Petitioner's question "1" will not have a ready answer. The suggestion that a trashman who removes waste from the backyard of — say, a clock manufacturer, is engaged in the production of clocks, would startle the ordinary student of the English language; and no doubt would be resented by a workman skilled in the production of clocks. Such is the proposition which petitioner requests the Court to consider by its tendered question "1". But petitioner is "just making it hard" when he presents a record

which merely shows that each such trashman only used three minutes a week in this "craftsman's" part of his otherwise humdrum work.

In the face of the jurisdictional obstacles; the unsatisfactory record; the absence of any conflict among the Circuits; and basic uncertainty in the petition itself, as to the questions involved; this Court should deny the writ.

Respectfully submitted,

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